STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee,

vs.

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a Governmental agency of MACOMB COUNTY,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 223829

Macomb Circuit No. 95-3319-CK

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PLAINTIFF'S BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID PLAINTIFF PRESENT SUFFICIENT EVIDENCE OF ILLEGAL RETALIATION TO AVOID BOTH A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT?

Plaintiff-Appellee Sharda Garg answers, "YES."

Defendant-Appellant answers, "NO."

The Circuit Court and Court of Appeals answer, "YES."

II. IS A NEW TRIAL WARRANTED WHERE BOTH THEORIES OF RETALIATION PROPERLY REACHED THE JURY?

Plaintiff-Appellee Sharda Garg answers, "NO."

Defendant-Appellant answers, "YES."

The Circuit Court and Court of Appeals answer, "NO."

III. WERE ALL OF PLAINTIFF'S DAMAGES CLAIMS PROPERLY SUBMITTED TO THE JURY PURSUANT TO THE "CONTINUING VIOLATION" DOCTRINE?

Plaintiff-Appellee Sharda Garg answers, "YES."

Defendant-Appellant answers, "NO."

The Circuit Court and Court of Appeals answer, "YES."

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COUNTER-STATEMENT OF FACTS

Defendant seeks leave to appeal from an unpublished Court of Appeals opinion (No. 223829; 3/29/02) (Defendant's Exhibit A) affirming a judgment upon a $250,000.00 jury verdict in favor of Plaintiff, Sharda Garg, on her claim of illegal retaliation under the Elliott-Larsen Civil Rights Act ("ELCRA"), MCLA § 37.2701(a); MSA 3.548(701). The Circuit Court entered Judgment in the amount of $354,298.17, inclusive of interest, costs and attorney fees, on August 17, 1998.[1]

Sharda Garg is an Asian Indian, British-educated and trained as a psychologist in India. Tr. 4/1/98, pp. 55, 57-59. She came to the United States having completed her Master's degree in psychology and all course work for her Ph.D. Id., at 59. Mrs. Garg began her employment with Defendant-Appellant Macomb County Community Mental Health Services ("MCCMHS") in 1978 as a Staff Psychologist-Therapist II at its Life Consultation Center ("LCC") Tr. 4/1/98, p. 76; Tr. 4/6/98, pp. 319-320. Almost from the inception of her employment, her performance ratings were "outstanding" or at the least, "very good". Tr. 4/1, pp. 114, 117, 54-65.

In 1981, Robert Slaine was Mrs. Garg's supervisor; Donald Habkirk was Slaine's supervisor. Mrs. Garg had seen Habkirk touch his female subordinates' undergarments and "snap" their bras. Tr. 4/1, pp. 122-123, 130. When, following a meeting, Habkirk attempted to touch Mrs. Garg from behind, she slugged him. Tr. 4/1, pp. 126-127, 129-130; Tr. 4/6, p. 241. She thus opposed his violation of the Elliott-Larsen Civil Rights Act's (ELCRA) prohibition against sexual harassment. Mrs. Garg and Habkirk had previously enjoyed a cordial relationship; after this incident, he became cold toward her. Tr. 4/1, p. 132.

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[1] Plaintiff challenges the affirmance of the trial court's computation of interest by way of cross-application (filed herewith).

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The first time following this incident that a promotion became available to Mrs. Garg was in 1983. Tr. 4/1, pp. 95-96, 136. Mrs. Garg's performance evaluation was downgraded to "satisfactory" just days before this T-III position was posted; she did not get the promotion. Tr. 4-1, pp. 137-138, 150.

Habkirk remained Mrs. Garg's ultimate supervisor in the "chain of command" through the time of trial. Tr. 4/2, p. 16; Tr. 4/3, pp. 159-161. He received copies of her applications for promotional positions, participated in at least some of Mrs. Garg's interviews for promotions, and, as Director, gave final approval to all promotional decisions. Tr. 4/1, p. 158; Tr. 4/2, pp. 16, 21-22, 24; Tr. 4/3, p. 160; Tr. 4/6, pp. 257, 260-261, 263-265. The proofs supported that Mrs. Garg's forceful resistance to Habkirk's behavior was not forgotten. Although Habkirk **admitted** that Mrs. Garg was a good employee, she received **no** promotion over the next **fifteen** years, and was the **only** therapist who failed to obtain a single promotion during their tenure at the LCC facility. See, for example, Tr. 4/1, pp. 151, 154; Tr. 4/2, pp. 14-20, 23-25, 27-28, 30-37, 40-45, 51-55, 61; Tr. 4/3, pp. 137, 156; Tr. 4/6, pp. 265-266. At one point Mrs. Garg's husband asked Robert Slaine why she wasn't being promoted. Tr. 4/1, pp. 133-134. Slaine replied that Habkirk didn't like her. Id., p. 134.

Kent Cathcart became Mrs. Garg's direct supervisor in 1986 and had been her previous supervisor's supervisor. Cathcart had made various racist remarks, including disparaging Indian doctors upon learning that Mrs. Garg's son had been accepted to medical school, and using the "N" word in reference to African-Americans. Tr. 4/2, p. 96; 4/6, p. 272: Tr. 4/9, pp. 871-873. Cathcart treated Mrs. Garg differently than the white employees. Tr. 4/1, pp. 105-108; Tr. 4/2, pp. 94-95, 97; Tr. 4/3, pp. 134-135. In June, 1987 Mrs. Garg filed a union grievance, alleging that she was being denied promotions on the basis of her national origin or color. Tr. 4/2, pp. 74-

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75; Exhibits 113, 115. Her grievance was denied. Tr. 4/2, p. 78. The next promotional opportunity that became available after Mrs. Garg filed the grievance was for the position of "DD Out Patient Therapist III" in December, 1988. Exhibits 34, 35, 36. Mrs. Garg applied and was rejected. Exhibits 36, 346; Tr. 4/2, p. 24-26.

Over the next several years, Mrs. Garg continued to apply for promotions and was continually rejected. In August, 1994 she wrote to Habkirk, requesting an investigation into why she had not been promoted. Tr. 4/2, pp. 68-69, 74-75; Tr. 4/9, p. 892. In October, 1994 Mrs. Garg's attorney sent a retention letter to defendant. Tr. 4/2, pp. 68-69. Between her 1987 grievance and the time she filed suit, Mrs. Garg was denied seven more promotions.

From 1983 until the time of trial, Mrs. Garg repeatedly sought to advance within the organization but her attempts were repeatedly thwarted. Mrs. Garg testified about the many promotions she sought but did not receive after she opposed sexual harassment by her boss, and after she complained she was being discriminated against on the basis of color/national origin. See, for example, Tr. 4/1/98, pp. 95-96, 136-138, 150-151, 154; Tr. 4/2/98, pp. 14-20, 23-25, 27-28, 30-37, 40-45, 51-55, 61; Tr. 4/3/98, p. 137; Tr. 4/6/98, pp. 265-266. The proofs demonstrated that defendant eased or waived the formal qualifications for positions for certain applicants, but not for plaintiff (Tr. 4/1, p. 187; Tr. 4/9, pp. 865, 898); that Ms. Garg was not asked the same questions at interviews as other applicants (Tr. 4/2, pp. 77-78); that the standard practice was to promote from within but that, nonetheless, positions she sought were given to new hires (Tr. 4/1, pp. 150-151, 154-155; Tr. 4/2, p. 23); and that selection of candidates for promotion was done on a subjective basis (Tr. 4/9, pp. 864, 880-881, 887-888).

Moreover, Mrs. Garg was treated in a degrading and humiliating manner. For example, Cathcart would on the one hand criticize her for not participating in agency activities, Tr. 4/2,

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p. 90, but her requests to participate in events, meetings, conferences and on committees were rejected. Id., pp. 84-90. Cathcart would reprimand Mrs. Garg in the presence of other employees if she came in to work two minutes late, but he allowed others to walk in whenever they wanted to. Id., at 94-95. Late in 1994, when the LCC was dissolved and Mrs. Garg was reassigned to a facility known as First North, she was given a make-shift office next to a bathroom. Tr. 4/2, p. 61; Tr. 4/3, pp. 186-187. Although she had the most seniority of anyone at the First North Facility, she was given the only office with no carpeting and no windows. Id., at 187-188. This "office" was nothing more than a shabby old storage room, in full earshot of the disgusting noises emanating from the bathroom next door. Tr. 4/3, pp. 186-188; Tr. 4/6, pp. 291-292, 299-301. She attributed the treatment she received to discrimination on the basis of color/national origin, and/or retaliation for opposing such discrimination and opposing her boss' sexual harassment under ELCRA. Opinion and Order dated November 3 1999, pp. 1-2.

Mrs. Garg testified to her wage loss and pension loss damages resulting from Defendant MCCMHS' unlawful refusal to promote her over the years. Tr. 4/7/98, pp. 497-506. She also testified to the emotional damages caused by Defendant's treatment of her, which included feeling very depressed, less sociable, withdrawn, deeply hurt, shaken up, stressed out, unable to give emotionally to her husband and children, in emotional turmoil, and questioning whether she had made a mistake in coming to the United States. Tr. 4/6/98, pp. 286-294. She experienced headaches, sleeplessness, increased blood pressure, loss of appetite and weight loss, which she attributed to the emotional distress she suffered. Id., at 286-289, 292-293.

The Circuit Court denied defendant's motion for directed verdict. Tr. 4/8, p. 802; 4/9, p. 778; 4/22, p. 136. In addition, the Court ruled that the "continuing violation" theory applied to plaintiff's retaliation claim, and instructed the jury that it could award damages for retaliation

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which occurred prior to July 21, 1992 (i.e., going back more than three years prior to the date of filing suit). Tr. 4/8, pp. 804-805; 4/22, pp. 9, 126. On April 23, 1998 the jury awarded Mrs. Garg a verdict of $250,000.00 on her retaliation claim. Id. Judgment in the amount of $354,298.17 was entered in Mrs. Garg's favor on August 17, 1998, consisting of the jury's verdict, costs awarded under ELCRA (MCLA § 37.2802; MCA 3.548) (802), attorney fees under the mediation court rule, and interest to date. Record.

Defendant moved for judgment notwithstanding the verdict, remittitur, and new trial. The trial court carefully considered these motions, requesting that counsel order and provide citations to the trial transcript. By written Opinion and Order (11/3/99), the trial court denied all of defendant's motions.

The Court of Appeals affirmed in all respects. The Court addressed each of Plaintiff's allegations of illegal retaliation, including: (1) that she was retaliated against for slugging her supervisor, Habkirk, in opposition to sexual harassment in 1981; and (2) that Defendant retaliated against her for her 1987 filing of a grievance alleging racial discrimination against the other supervisor, Cathcart. With regard to the first of these allegations, the Court of Appeals observed, based on the record, as follows:

> "Plaintiff sufficiently established a jury question with regard to these elements by way of her evidence, concerning the slugging incident, that (1) she had observed Habkirk pulling an employee's bra strap while walking behind her and pulling an employee's underwear elastic while seated behind her; (2) around the same time, in 1981, Plaintiff was walking along a hallway when she felt somebody touching her back; (3) she turned around and swung at this person; (4) the person was Habkirk, one of her supervisors; (5) after the slugging incident, Habkirk became cold toward her; (6) a co-worker told her that Habkirk did not like her; (7) Plaintiff did not receive the first available promotion, in 1983, after the slugging incident, despite being qualified for the position; (8) Plaintiff was denied eighteen total promotions between 1983 and 1997, despite being qualified for the positions; (9) individuals less qualified than Plaintiff received promotions while Plaintiff did not; and (10) Habkirk remained in her chain of command throughout the years." [Court of Appeals' Opinion; Defendant's Exhibit A, at p. 2].

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The Court concluded that reasonable jurors "could differ with regard to whether Plaintiff sufficiently established the elements of a retaliation claim." Id., p. 3. With regard to the "second retaliation theory," relating to the grievance alleging racial discrimination in 1987, the Court of Appeals stated:

> "*** Plaintiff sufficiently established the elements of a retaliation claim by way of her evidence that (1) Plaintiff filed a grievance alleging racial discrimination in June 1987; (2) Cathcart, a supervisor, knew about the grievance; (3) after filing the grievance, Plaintiff failed to receive the next promotion that she sought, posted in December 1988, despite being qualified for the position; (4) Plaintiff failed to receive seven total promotions between 1989 and 1997, despite being qualified for the positions; (5) individuals less qualified than Plaintiff received promotions while Plaintiff did not; (6) in 1994, Plaintiff was transferred to a windowless office from which she could hear noises emanating from the adjacent bathroom, while persons more senior to Plaintiff received better offices; (7) in 1996, Cathcart made a statement disparaging to blacks; (8) Cathcart made another comment disparaging to Indians; (9) Cathcart reprimanded Plaintiff but not others for minor infractions; (10) Cathcart ignored Plaintiff in staff meetings and treated her poorly in the hallways; (11) in 1984 and 1985, Cathcart used the word 'n-----' in referring to blacks; and (12) Cathcart remained in Plaintiff's chain of command throughout the years." [Id., p. 3].

The Court stated that these proofs met the causal connection element of Plaintiff's retaliation claim, noting further that "Plaintiff was denied the first promotion that she sought after the filing of the grievance." Id.

In addition, the Court of Appeals concluded that the "continuing violation" rule applied to render timely Plaintiff's complaint with regard to all of the matters submitted to the jury. Id., pp. 3-4; citing, among other cases, Sumner v Goodyear Tire & Rubber Co., 427 Mich 505 (1986).

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ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF PRESENTED SUFFICIENT EVIDENCE FOR JURY CONSIDERATION

In reviewing the denial of a motion for directed verdict or JNOV, the Court must consider the evidence and all reasonable inferences to be drawn therefrom in a light most favorable to the plaintiff. Orzel v Scott Drug Co., 449 Mich 550, 557 (1995); Caldwell v Fox, 394 Mich 401, 407 (1975). Whenever a fact question exists, upon which reasonable minds may differ, the trial judge may not direct a verdict," because the "jury, not the trial judge, is the trier of fact." Id., 407. This Court has always followed the view of Chief Justice Cooley, who stated for the Court in Detroit & Milwaukee R Co. v Van Steinburg, 17 Mich 99, 117 (1868):

> "In determining this question, we must look at the case as it appears from the plaintiff's own testimony, unqualified by any which was offered on the part of the defendants, and must concede to him any thing which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and however improbable some portions of his testimony may appear to us, we can not say that the jury might not have given it full credence. It is for them, and not for the Court to compare and weigh the evidence."

Caldwell, supra, 394 Mich 401, 407. "Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." Wilkinson v Lee, 463 Mich 388, 391 (2000). If the evidence is such that reasonable jurors could have found for the plaintiff, the trial court may not substitute its judgment for that of the jury. McLemore v Detroit Receiving Hospital, 196 Mich App 391, 395 (1992).

Here, defendant posits that Mrs. Garg failed to make out a *prima facie* case of retaliation in violation of MCLA 37.2701; MSA 3.548(701) , and that the trial court should therefore have granted a directed verdict, or JNOV, in its favor. The statute provides, in pertinent part:

Two or more persons shall not conspire to, or a person shall not:

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> Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCLA 37.2701(a)].

Contrary to Defendant's claim, the proofs more than adequately met Plaintiff's burden to demonstrate (1) that she engaged in a protected activity; (2) that this was known to the defendant; (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. Mitan v Neiman Marcus, 240 Mich App 679, 681 (2000); DeFlaviis v Lord & Taylor, Inc., 223 Mich App 432, 436 (1997); *see also*, Phinney v Perlmutter, 222 Mich App 513, 553 (1997) (retaliation under Whistleblowers' Protection Act); Little v B.P. Exploration & Oil Co., 265 F3d 357, 363 (CA 6, 2001). Plaintiff in fact engaged in two protected activities, both of which were known to defendant. As a result, plaintiff's efforts to advance her career were continuously stonewalled over a period of fifteen years.

A. Retaliation For Opposition To Sexual Harassment

The proofs reflect that in the early 1980's, Mrs. Garg observed Habkirk, then supervisor of LCC, sexually harass a female employee by snapping her bra and pulling on her underpants. Tr. 4/1, pp. 122-123, 130. When Habkirk approached and touched Ms. Garg from behind, she slugged him, forcefully opposing his practice of sexual harassment. Habkirk's unwanted, lecherous touching of Plaintiff constitutes sexual harassment, under Michigan and other law. E.g., MCLA § 37.2103(i). She did not verbalize her opposition to his sexual harassment but, as the Circuit Court noted in granting plaintiff leave to amend her complaint, "certain physical acts can convey a message better than words." Opinion and Order dated 7/10/96, pp. 6; Opinion and Order dated 9/27/96, pp. 4. One can demonstrate opposition to sexual harassment nonverbally, such as by slugging the bra-snapper. See, for example, Chamberlain v 101 Realty, Inc, 915 F2d

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777, 784 (CA 1, 1990) (employee consistently demonstrated her unalterable resistance to sexual advances by walking away, changing the subject of conversation, and removing her hands when the harasser took her hands in his); Jones v Wesco Investments, Inc, 846 F2d 1154 (CA 8, 1988) (pushing supervisor away and leaving room evidences unwelcomeness).

An immediate slap to a sexual harasser's face is the most direct, indeed a traditional form of "opposition" to such misconduct. An employee's opposition falls within the statutory protection unless it "violates legitimate rules and orders of [the] employer, disrupts the employment environment, or interferes with the attainment of [the] employer's goals." Evans v K.C. School District, 65 F3d 98, 102 (CA 8, 1995); citing, Booker v Brown & Williamson Tobacco, 879 F2d 1304, 1312 (CA 6, 1989). It would hardly be "legitimate" for an employer to expect submission to such neanderthalish harassment, or to forbid employees to respond thereto. It is the harasser who disrupts the environment by illegally creating the hostile atmosphere. The employer cannot claim passive submission as a legitimate goal.

Thus, Defendant's argument that the incident cannot, as a matter of law, constitute protected activity has no merit. To the contrary, it requires no stretch of the imagination for a "reasonable person" to conclude that if a person slugs them as they attempt to do something, the person slugging is expressing opposition to what they are attempting to do.

Moreover, the activity here was unequivocal, i.e., in context, it would communicate **only** opposition, just like a slap in the face communicates opposition when it is delivered to one attempting to deliver an unwelcome kiss. For this reason, Crumpton v St Vincent's Hospital, 963 F Supp 1104 (ND Ala, 1997), cited by defendant, is inapposite: the conduct there (refusing to sign a form pertaining to a retirement account) could not be understood to be opposition to racial harassment. That court observed, "Simply complaining about a supervisor's conduct [requesting

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that plaintiff sign a form] or refusing to comply with a request to sign a form does not constitute protected activity **in this context**." Id., at 1119 (emphasis added). Plaintiff submits that **in context**, a reasonable person could conclude that Ms. Garg's slug to Habkirk constituted opposition to sexual harassment.

To the extent that the defense urges that informal opposition to discrimination does not trigger the anti-retaliation provision of ELCRA, defendant's argument is contrary to current Michigan law. Thus, in Mitan, 240 Mich App at 681, the Court quoted McLemore v Detroit Receiving Hospital, supra, 196 Mich App at 396, for the proposition that:

> "[r]egardless of the vagueness of the charge or the lack of formal invocation of the protection of the [Civil Rights Act], if an employer's decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs."

Defendant has argued that there is a failure of proof of the second element of plaintiff's retaliation claim: that it knew of Mrs. Garg's opposition to sexual harassment. This is an absurd argument: Habkirk, as director of the Center, **was** the defendant, and certainly Mrs. Garg's slug informed him of his inappropriate behavior. Opinion and Order denying JNOV, motion for new trial and remittitur dated 11/3/99, p. 5; Radtke v Everett, 442 Mich 368, 397 (1993); McCalla v Ellis, 180 Mich App 372, 379 (1989); MCLA § 37.2201(a); MSA 3.548(201)(a) (definition of "employer"). Habkirk played a role in the subsequent retaliation. He remained in a supervisory role over Plaintiff. Knowledge of the protected activity is clear on this record, or readily inferable. See, Gordon v New York City Bd. of Education, 232 F3d 111, 116-117 (CA 2, 2000).

The jury reasonably made the causal connection between the protected activity and subsequent adverse employment decisions. The following proofs establish the causal link: (1) Habkirk became cold to Mrs. Garg after the slugging incident, (2) Habkirk directly participated in plaintiff's interviews for at least two positions which she was denied, and had been informed

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of Mrs. Garg's application for the other promotional positions, (3) Habkirk was the head of the "chain of command" for all of the positions she was denied, (4) Mrs. Garg was qualified for the promotional positions she sought, Tr. 4/1, pp. 139, 154, 158; Tr. 4/2, pp. 17, 18-19, 23, (5) lesser qualified employees were hired for both promotional and lateral transfer positions instead of plaintiff, Tr. 4/1, pp. 151, 154, 166; Tr. 4/2, pp. 15, 17, 25, (6) Mrs. Garg had been told by Slaine that she wasn't being promoted because Habkirk didn't like her, and (7) there was no evidence of any other reason for Habkirk to dislike Mrs. Garg.

The case are rare in which the head of an organization verbalized or wrote that he would make sure an employee didn't get promoted because the employee had opposed or challenged discrimination. Such direct evidence is not required. International Brotherhood of Teamsters v United States, 431 US 324, 358 at fn. 44 (1977); McLemore v Detroit Receiving Hosp, supra, 196 Mich App at 396. As the trial court observed:

> Considering that plaintiff presented considerable evidence of many promotions denied where plaintiff was qualified for such positions and lesser qualified persons were hired, reasonable minds could conclude that Donald Habkirk used his position of authority to retaliate against plaintiff for her opposition to his perceived act of sexual harassment.

Opinion and Order dated 11/3/99, p. 7.

Defendant argues that the time interval between the protected activity and the denials of promotions was too great for a causal connection to exist. (Defendant ignores the immediate change in Habkirk's behavior toward Mrs. Garg, focusing only on the 1983 promotional position she sought.) Defendant cites many cases that have held the time interval between the protected activity and the claimed retaliation can negate an inference of retaliation. There are also cases which hold that temporal proximity alone is insufficient to link a protected activity to an adverse

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employment action. Johnson v University of Cincinnati, 215 F3d 561, 582 (CA 6, 2000); Feltmann v Sieben, 108 F3d 970, 977 (CA 8, 1997) and cases cited therein.

The better-reasoned cases reject the notion that the passage of time between the protected activity and the adverse employment effect is, as a matter of law, proof that retaliation has not taken place. In Shirley v Chrysler First, Inc., 970 F2d 39 (CA 5, 1992), Chrysler argued that the passage of 14 months should be legally conclusive proof against retaliation. The Fifth Circuit disagreed:

> Consideration of such dates is part of our analysis, but not in itself conclusive of our determination of retaliation....We see no reason to adopt Chrysler's position and expand the requirements for establishing a prima facie case of retaliation. The district court properly weighed the lapse of time as one of the elements in the entire calculation of whether Shirley had shown a causal connection between the protected activity and the subsequent firing.

Id., at 43-44. Similarly, in Robinson v Southeastern Pennsylvania Transportation Authority, 982 F2d 892 (CA 3, 1993), defendant argued that events occurring in early 1984 were too remote from plaintiff's December, 1995 dismissal to be considered a cause of his termination. Citing Shirley, supra, the Third Circuit held:

> Although almost two years passed between these events and Robinson's termination from employment, we cannot say the trial judge was clearly erroneous in including these events in his determination that retaliation occurred. The mere passage of time is not legally conclusive proof against retaliation....We find substantial support for the trial judge's conclusion that Robinson's termination had its roots in these earlier confrontations over race.

982 F2d at 894-895. The only conclusion which can be drawn from these cases, therefore, is that the temporal relation is a factor **but not the sole factor** to consider in determining whether retaliation has occurred.

In the case at bar, the evidence of retaliation begins with Habkirk's coldness toward plaintiff after the slugging incident, and "unfolds" over time to encompass a continuing series of

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adverse employment actions. Sumner v Goodyear Tire & Rubber Co, 427 Mich 505, 526 (1986); Opinion and Order dated 7/10/96, p. 6; Robinson, supra, at 895-896 ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario"). Rather than negating an inference of retaliation, the time intervals in this case buttress plaintiff's claim that Habkirk never forgot the incident in which she fought back against sexual harassment. Id., at 4; Opinion and Order dated 4/30/97, p. 5.

B. Retaliation For Opposition To Discrimination On The Basis Of National Origin And Color.

The proofs reflect that in June, 1987 Ms. Garg filed a grievance asserting she was denied promotions based on her national origin or color. The grievance went to Cathcart at the first step and Habkirk at the second step. In August, 1994 she wrote to Habkirk, requesting an investigation into why she had not been promoted. In October, 1994 plaintiff's attorney wrote to defendant, stating she had been retained to represent Ms. Garg in connection with her difficulties in the workplace.

Between her 1987 grievance and the time of trial, Ms. Garg was denied seven more promotions, was denied additional credentials (until Cathcart's decision was overturned by a Mental Health Department Subcommittee), was denied a key to the office building, was berated for conduct for which no other employees were berated, Tr. 4/3, pp. 134-135, was issued multiple performance memos in a single day, Tr. 4/3, p. 205, and was relegated to an "office" which was an uncarpeted former storage room within full earshot of disgusting noises emanating from the bathroom next to it. During the majority of this time, Ms. Garg worked under Cathcart; during the entire time period Habkirk remained defendant's Director.

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Certainly Cathcart and Habkirk knew Ms. Garg had complained of national origin discrimination, since her grievance went to both of them. Cathcart was directly involved in at least two of plaintiff's subsequent attempts to get promoted, as well as in rejecting Ms. Garg's application for additional credentials, and was a significant member of the "chain of command." He admitted to witness Carmine his promotional criteria were subjective and personal, and that as a manager he had the right to promote the kind of people he wants to. Tr. 4/9, pp. 887-888. Donald Habkirk remained defendant's Director during this entire time period. Ms. Garg's August, 1994 letter went directly to him. To argue that the "decision-makers" had no knowledge of her discrimination complaint is disingenuous at best. Reasonable jurors could have concluded that Ms. Garg would never receive a promotion if Cathcart and Habkirk didn't want her to, and that one reason they blocked her efforts to advance her career was her opposition to national origin/color discrimination.

The same reasoning applies to defendant's "temporal proximity" argument in regard to the retaliation for opposing national origin/color discrimination as applied to Habkirk's retaliation against Mrs. Garg for opposing sexual harassment.

Defendant contends that Mrs. Garg was not treated any worse after filing her national origin/color grievance than she had been treated previously, and therefore plaintiff is unable to make a causal connection between the filing of her grievance and any adverse employment action. First, defendant is incorrect, since the micro-supervision and make-shift office assignment occurred after, but not before, she filed the grievance. Second, there was sufficient evidence from which, as the Circuit Court concluded, "a jury could reasonably conclude plaintiff's supervisors intended to deny any promotions to plaintiff and make plaintiff's life miserable because she filed a grievance." Opinion and Order dated 11/3/99, p. 9. Third, if

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defendant's adverse treatment of Mrs. Garg was in retaliation for "opposing **a** violation of the [ELCRA]," it cannot be allowed to escape liability by making it impossible to prove which of multiple instances of "opposing" provoked the retaliatory treatment. Thus, the Sixth Circuit had no difficulty in concluding that plaintiff's discharge was in retaliation for several actions he took in opposing discrimination against women and minorities, and for filing a claim with the Equal Employment Opportunity Commission. Johnson v University of Cincinnati, supra, 215 F3d 580-583.

A retaliatory failure to promote constitutes actionable retaliation. Smith v Georgia, 684 F2d 729 (CA 11, 1982); United States v Montgomery, Alabama, 788 F Supp 1563, 1573-1574 (MD Ala., 1992); Guilday v Dept. of Justice, 485 F Supp 324, 325-326 (D Del., 1980). Promotions are among the list of "ultimate employment decisions" which fall within the realm of impermissible retaliation. Dollis v Rubin, 77 F3d 777, 781-782 (CA 5, 1985).

The defense, of course, has brought forth certain claimed, non-discriminatory justifications for its failure to promote Plaintiff, but the jury was not bound to believe them. The passage of time, in and of itself, does not destroy the claim. Plaintiff does not rely upon temporal considerations alone to establish her claim, but upon all of the other evidence in the case, which is summarized above and in the Court of Appeals' opinion. The passage of time is not dispositive. Having eliminated the legitimate reasons for the failure to promote, Plaintiff is entitled to recover. Williams v Nashville Network, 132 F3d 1123, 1132-1133 (CA 6, 1997); Johnson, supra, 215 F3d at 581 (where the jury could determine that the defendants' justifications had "no basis in fact or are insufficient to explain" the defendant's conduct, a jury question remained).

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The instant case is vastly distinguishable from Clark County School District v Breeden, 121 S Ct 1508 (2001), cited by Defendant. Breeden involved a previous complaint of sexual harassment based upon a single lewd joke. In this case, Ms. Garg opposed sexual harassment in the workplace, and testified that the perpetrator, Habkirk, her ultimate supervisor in the chain of command and a decisionmaker with regard to the later, promotional opportunities, touched his female subordinates' undergarments and would "snap" their braziers; and reached out to touch Plaintiff from behind, whereon she slugged him. In Breeden, the plaintiff admitted that the single-isolated incident "did not bother or upset her."

The passage of time does not automatically negate a retaliation claim. In Jackson v RKO Bottlers of Toledo, 743 F2d 370, 377, fn. 4 (CA 6, 1984), the Court rejected the trial judge's reliance on a thirty-month lapse between a discrimination charge and the employment discharge, because the District Court had ignored proofs which, "if believed, would raise an inference that defendant had engaged in a pattern of retaliatory conduct beginning soon after plaintiff filed discrimination charges." The same is true in the present case. Immediately after Plaintiff slapped Habkirk, he became cold toward her, learned that Habkirk did not like her. Within less than two years, the pattern of discriminatory non-promotion began. While a lengthy temporal break may undercut an inference of causation in some cases, that is not necessarily the case, where the employer retaliates at the first available opportunity. In McGuire v City of Springfield, 280 F3d 794, 796 (CA 7, 2002), the Court addressed a similar scenario:

> "Passage of time was not necessarily a sign of forbearance; it does not signal that the employer remained satisfied with the employee's work despite the charge of discrimination. Instead the delay reflects molasses in the administrative process. Because the IDHR took a decade to issue its order, the City had no earlier opportunity to remove McGuire from the training program."

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This is not an instance in which the jury's causation finding represents "sheer speculation." Cardenas v Massey, 269 F3d 251, 264 (CA 3, 2001).

Mrs. Garg successfully met her burden of proving retaliation in violation of the ELCRA.

II. BECAUSE BOTH "THEORIES" OF RETALIATION WERE PROPERLY SUPPORTED BY THE PROOFS, A NEW TRIAL IS NOT WARRANTED

Defendant correctly states the law that a new trial is required where a case is submitted to the jury on several theories of liability, one of which is not properly in the case. However, this is not the situation at bar.

First, as discussed in detail in Issue I., supra, to the extent that plaintiff presented two "theories" of retaliation liability, she made out a prima facie case as to each.

Second, Plaintiff submits that the proofs which resulted in the verdict presented one theory of retaliation liability, under § 701 of the Elliott Larsen Civil Rights Act, MCLA 37.2701; MSA 3.548(701) for opposing discrimination. Thus, the case at bar cannot be compared to Rancour v Detroit Edison Co., 150 Mich App 276 (1986), which involved two different theories, one of discrimination and one of failure to accommodate a handicap. While Mrs. Garg's "opposition" occurred more than once and occurred at different times, the jury reasonably concluded defendant retaliated against plaintiff for doing so. Johnson v University of Cincinnati, supra.

Third, Defendant points to no objection to the verdict form, or to the jury instruction that "Plaintiff must prove by a preponderance of the evidence that the Defendant retaliated against her for having opposed sexual harassment and for filing a union grievance alleging discrimination." Tr. 4/22, p. 127, which the Court prepared and presented to counsel prior to instructing the jury. Id., at 8. If, *arguendo*, the trial court committed error, Defendant cannot

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now benefit from having remained silent at the time. Phinney v Permutter, supra, 222 Mich App at 556-557.

Furthermore, error requiring reversal does not occur even if the trial court mistakenly submits one sub-theory to the jury, if the verdict has support under a different theory. Flones v Dalman, 199 Mich App 396, 405-406 (1993); Cronk v Chevrolet Local 659 (UAW), 32 Mich App 394, 403-404 (1971). "Appellate courts should not interfere, unless the errors complained of may fairly be said to have had a controlling influence in securing the result." Fort Street Union Depo Co. v Jones, 83 Mich 415, 418 (1890).

III. WHERE PLAINTIFF WAS SUBJECTED TO CONTINUING DISCRIMINATION OVER A PERIOD OF MANY YEARS, ALL OF HER DAMAGES CLAIMS PROPERLY WENT TO THE JURY PURSUANT TO THE "CONTINUING VIOLATION" DOCTRINE

Under MCLA § 600.5805(8), an action for discrimination or retaliation under the ELCRA must be brought within three years after the cause accrues. However, as the Circuit Judge ruled:

> The effect of the statute of limitations on employment discrimination claims has Been ameliorated somewhat by the continuing violations doctrine announced in Sumner v Goodyear Tire & Rubber Co, 427 Mich 505, 398 NW2d 368 (1986). Under this doctrine, a continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy. Sumner at 534. The crux of the doctrine is that a continuing wrong is established by continual tortious acts, not by continual harmful effects from an original, completed act. Horvath v Delida, 213 Mich App 620, 627; 540 NW2d 760 (1995).

Opinion and Order dated 7/10/96, p. 4.

Like Sumner, 427 Mich at 528, and Phinney v Perlmutter, supra, 222 Mich App at 546-548, this case presents a continuing course of conduct where plaintiff has been subjected to a series of retaliatory acts, sufficiently related to constitute a pattern, at least one of which occurred

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within the limitation period. Plaintiff was therefore entitled to seek compensation for the entire course of retaliatory conduct to which she was subjected, even though some of that conduct pre-dated 1992.

In Sumner, this Court adopted the continuing violation doctrine as part of Michigan's civil rights/discrimination jurisprudence, "concluding that an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred." 427 Mich 505, 520. In Sumner, the plaintiff, an African-American, experienced a continuing course of harassment, despite his complaints to union officials. Id., 513-514. The Court placed his claim within the "continuing course of conduct" sub-theory which is a part of the "continuing violation" doctrine. Id., 528 (citations omitted). Quoting from Berry v LSU Board of Supervisors, 715 F2d 971, 981 (CA 5, 1983), this Court set forth the factors to be considered in determining whether a continuing course of conduct exists:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate [427 Mich at 538].

In this case, the situations were similar (failure to promote), recurred frequently, and continued to a point within the period of limitations. Jackson v Quanex, 191 F3d 647, 668 (CA 6, 1999). In Bell v Chesapeake & Ohio Railway, 929 F2d 220 (CA 6, 1991), cited by Defendant, there were only a handful of instances of claimed harassment over a nine-year timeframe, and hence, no "continuing course of conduct as a matter of law." Id., 225. In this case, the retaliation pattern was ar more continuous and recurrent.

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Phinney, supra is directly on point. In that case, the Court of Appeals applied the continuing violation doctrine to a species of retaliation claim (a whistleblower complaint):

> "As in Sumner, the facts here fit within this analysis. The alleged acts involve the same subject matter, i.e., retaliation, and occurred with fairly high frequency. Sumner, supra, pp. 538-539. As with harassment, the nature of a retaliatory act is that it ceases once the intent to retaliate ends. It does not provide notice of subsequently neutrally initiated injuries. Id., 539. Accordingly, we believe that there was a genuine issue of material fact regarding whether there was a continuing course of conduct that violated the plaintiff's rights..." [222 Mich App at 548].

Defendant submits that because plaintiff complained at some point beyond the three-year period of limitations, the continuing violation doctrine does not apply, relying on Rasheed v Chrysler Corp, 196 Mich App 196 (1992). Defendant says that in Rasheed this Court reversed "on other grounds" (Application, p. 41). In fact, the entire analysis of the statute of limitations issue by the Court of Appeals was **vacated** by this Court. This Court concluded that Defendant had never even properly raised the limitations defense as it related to the continuing violation doctrine at the time of trial, rendering any analysis of the issue "unnecessary." Rasheed v Chrysler Corp, 445 Mich 109, 134-135 (1995). Thus, the Court of Appeals correctly held (herein) that the statements in Rasheed with regard to the continuing violation doctrine are overruled (Defendant's Exhibit A; C/A Opinion, pp. 4-5, fn. 2).

The Court of Appeals' analysis in Rasheed is, in fact, contrary to Michigan law, particularly Sumner itself. At the trial judge noted, in Sumner, the plaintiff had already gone to his union to find relief from workplace harassment, yet this Court nonetheless found that the continuing violation doctrine applied. 427 Mich at 514, 538; see also, Meek v Michigan Bell, 193 Mich App 340 (1992); Thomas v MESC, 154 Mich App 736, 743-744 (1986) (applying the continuing violation doctrine based on a continuing course of harassment and unequal treatment throughout the term of plaintiff's employment).

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It is simply not true, as Defendant would have it, that Plaintiff must bring a lawsuit as soon as she becomes aware of the discrimination or retaliation. That notion is at direct odds with Sumner: employees may reasonably delay filing their complaints "in the hope of internal resolution or simply to give the employer a second chance." 427 Mich at 525-526. "There are important policy reasons not to require that a discrimination complaint be filed at the first instance of discrimination or not at all," because to do so "would frustrate the broad remedial purposes of civil rights laws which encourage the eradication of discrimination." Hall v Cuyahoga Valley Board, 926 F2d 505, 511 (CA 6, 1991).

The Court of Appeals correctly affirmed the application of the continuing violation doctrine to this case. Defendant has engaged in similar acts (failure to promote) over a lengthy period of time, with frequent recurrences, continuing to a point well within the period of limitations. Jackson v Quanex, 191 F3d 647, 667.

CONCLUSION AND RELIEF REQUESTED

The trial court properly denied Defendant's various motions. Plaintiff's proofs created a prima facie case of retaliation by Defendant, in violation of the Elliott-Larsen Civil Rights Act, for her opposition to Habkirk's sexual harassment and for filing a grievance opposing discrimination on the basis of national origin/color. The evidence warrants a reasonable jury's verdict in favor of Mrs. Garg as to both instances of "opposition". Moreover, Defendant's continuing course of retaliatory conduct toward Mrs. Garg over many years supports application of the "continuing violation" doctrine, permitting Mrs. Garg to recover damages for retaliatory treatment which occurred more than three years prior to the filing of her Complaint.

Based on the foregoing argument and the above-cited authorities, Plaintiff-Appellee Sharda Garg urges this Honorable Court to deny Defendant's Application.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee,

vs.

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a Governmental agency of MACOMB COUNTY,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 223829

Macomb Circuit No. 95-3319-CK

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

SHARON THRASHER, being first duly sworn, deposes and says that on the 9th day of May, 2002, she served a copy of the BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL and PROOF OF SERVICE upon the following:

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by placing said copies in an envelope properly addressed and depositing said envelope in the U.S. mail located at Southfield, Michigan.

Further, Deponent sayeth not.

Sharon Thrasher
SHARON THRASHER

Subscribed and sworn to before me,
this 9th day of May, 2002.

NOTARY PUBLIC

PATRICIA L. CHAPMAN
Notary Public, Oakland County, MI
My Commission Expires Sept. 18, 2002

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